United States Court of Appeals

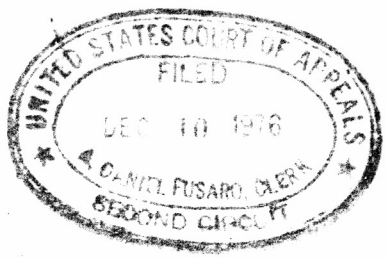
for the Second Circuit

BRIEF FOR APPELLEE

76-7430-7535

United States Court of Appeals

FOR THE SECOND CIRCUIT



LOCAL 771, I.A.T.S.E., AFL-CIO,

Plaintiff-Appellee-Cross-Appellant,

—v.—

RKO GENERAL, INC., WOR DIVISION,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF'S BRIEF AS CROSS-APPELLANT AND AS APPELLEE

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INDEX

TABLE OF AUTHORITIES

Cases:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT .

LOCAL 771, I.A.T.S.E., AFL-CIO,	
Plaintiff-Appellee-Cross-Appellant,	No. 76-7430 and 7535
-v-	
RKO GENERAL INC., WOR DIVISION,	
Defendant-Appellant-Cross-Appellee.	

On Appeal From The United States District Court
For The Southern District of New York.

PLAINTIFF'S BRIEF
AS CROSS-APPELLANT AND AS APPELLEE

ISSUE PRESENTED BY PLAINTIFF AS CROSS APPELLANT

Can an arbitrator's refusal on time - bar grounds to exercise his power to pass on the merits of a dispute be permitted to stand despite (a) immediate judicial invocation of arbitration in a patently multilateral controversy; (b) the employer's persistent refusal to arbitrate on the merits unless all parties

were before the arbitrator and (c) obstacles created by the pendency of an (i) employer-invoked NLRB restraining order and (ii) NLRB multilateral dispute litigation.

STATEMENT OF THE POSTURE OF THE CASE

These appeals were ordered to be perfected without prejudice to plaintiff's motion argued November 3, 1976, to dismiss defendant's appeal (140a) by a panel of the Court (Moore, Feinberg, Meskill, C.J.), which heard the motion. Thereupon plaintiff's contingent cross-appeal (141a) was docketed, the time within which to do so having been previously enlarged by order of Oct. 6, 1976, Meskill, C.J.*

As was stated in the Sept. 23, 1976 Moving Affidavit to dismiss defendant's appeal, the Employer rests its case on an

> "arbitrator's award which held, in effect that a defendant that had resisted arbitration for 10

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*Re Rule 28 (h) F.R.A.P.: The initial appeal in point of time was defendant's and the cross-appeal was not intended to be docketed unless the motion to dismiss were denied. The order of Nov. 3 directed defendant-appellant to supply the appendix and file the initial brief, and by letter (Nov. 6) to the Staff Counsel, reporting the docketing of the cross-appeal, plaintiff-appellee-appellant expressed its intention to combine its brief as cross-appellant with its brief as appellee; a copy of that letter was sent to defendant appellant's counsel, which agreed to such procedure after a subsequent conversation between the writer of this brief and Jonathan L. Sulds, Esq. of counsel for defendant-appellant-appellee.

months after an initial labor dispute arose, could 'sandbag' the grievant by suddenly withdrawing its opposition to a hearing by an arbitrator and then, at that hearing, avail itself of a time-lag created by its own course of conduct as a purely procedural bar to consideration - in arbitration - of the merits of the dispute.

"Defendant was enabled by the arbitrator to set a procedural trap for the plaintiff . . . to prevent plaintiff from ever getting a decision on the merits of a claim of breach of contract."

Said motion, after arguing nonappealability, noted also:

"The Plaintiff was aggrieved by the ruling of time-bar on arbitrabilty by the arbitrator in the face of a lawsuit seeking arbitration commenced within three days after the event to be sought to be arbitrated. Because of this and other reasons that make the arbitrator's decision outrageous, the decision denying the motion to vacate the award and granting confirmation may well be independently appealable.

"Plaintiff has chosen, for an expeditious determination of its grievance to prosecute the action below. However, the Plaintiff is filing a cross-notice of appeal, within the time provided by the Federal Rules of Appellate Practice, as a contingent protection only."

However, because the motion to dismiss was not decided but instead referred to the panel that will hear these appeals, it became necessary in order fairly to present plaintiff's case, to perfect our cross-appeal. We now press it for decision. (As to the cross-appeal, there was no motion to dismiss or objection on the ground of non-appealability.)

We respectfully suggest that the cross-appeal can and should be considered on the merits. In declining to vacate the

so-called arbitrator's award, Judge Pollack did in fact determine "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (Weilbacher v. J. H. Winchester & Co. 197 F. 2d, 305, 1952, quoting Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541).

Plaintiff's separable claim of right is to be relieved of an outrageous, - to put it charitably, grossly hypertechnical, and to put it bluntly, biased and probably tainted* arbitration ruling that will stand as precedent and be unappealable if plaintiff prevails on the merits before Judge Pollack; such right is independent of the cause itself, and is collateral to (it did not decide) the substantive rights asserted in the action.

The factors to which we have just adverted, justifying

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*As the record shows, Schmertz was acquiesced in by plaintiff's counsel as one of a panel of proposed arbitrators at a time when defendant's then counsel of record were the Regan firm, by Mr. Gallagher. Only after the AAA selected Schmertz was the Proskauer firm's substution made known. The record shows, n.p. 62a that Schmertz would not have been acceptable to us if we had known that the Proskauer firm stood in the wings: A senior labor-law litigator of that firm serves with Schmertz on the New York City Office of Collective Bargaining, and only by the Proskauer firm's member's affirmative vote can Schmertz be elected and re-elected to his position as an "impartial" board member. See ADDENDUM excerpt from the Official City Directory, the so-called "Little Green Book."

present appealabilty as to order of confirmation will be evident on review of the merits of the cross-appeal. And if the cross-appeal has merit, as we respectfully urge it does, the reversal of Judge Pollack's order declining to vacate the Schmertz "time-bar" award will make academic the defendant's appeal,which will then be moot. If we do not prevail on the cross-appeal, then the defendant's appeal, for reasons heretofore presented on brief and in affidavit, submitted Nov. 3, both of which are respectfully incorporated herein, should be dismissed on grounds of lack of jurisdiction. And in any event, the defendant's appeal is without merit substantively: we state our position as appellee below at p. 33. The nature of the controversy is such that the points made herein on plaintiff's behalf as appellant, must and should be considered on defendant's appeal from the interlocutory order - if the Court should ever reach it - in evaluating plaintiff's case as appellee.

PART I

PLAINTIFF'S BRIEF AS CROSS-APPELLANT

Facts Relevant to the Issue Presented for Review

The record on which the plaintiff sought vacatur of the Time-Bar "award" consists of an affidavit of plaintiff's counsel of May 21, 1976 (59a - 77a) - no factual statement of which was denied - summarizing the matters presented to the arbitrator, together with a number of documents including a temporary injunction in an NLRB case filed by defendant (56a- 56b) of which the arbitrator was informed.

The facts were summarized in part in the opinion below. We open with a condensation of such summary. (References are to the opinion as it appears in the Appendix.) There were, however major factors, not adequately dealt with by Judge Pollack, which shall be stressed at the conclusion of the following summary: they help to place in focus the incorrectness of his refusal to vacate the Schmertz "award".

(a) the multilateral quality of the dispute throughout;

(b) the dogged and successful resistance of defendant to arbitration and Judge Pollack's own expressed reluctance to interfere pending relinquishment of the case by NLRB:

(c) the force and effect of Judge Brieant's injunction.

The significance of these factors in helping demonstrate the necessity for correction of arbitral misconduct, is best understood after a reading of the facts-in-outline. Of course, the plaintiff's case having been presented on an attorney's narrative statement of the presentation to the arbitrator, and that affidavit having itself been a summary rather than a full record, the outline that follows is not in any sense meant to suggest that a careful reading of that wholly uncontradicted affidavit should be dispensed with, and we know the Court will read it with interest and care (59a - 77a).

Plaintiff is a labor organization representing a bargaining unit in the motion picture editing craft whose contract with the defendant, a television broadcasting station, gave it the right to perform the editing function "whether made on or by film, tape or otherwise" (118a - 121a). On February 21, 1975, the employer switched from film cameras to video tape cameras for news gathering and gave the editing work to persons in a different bargaining unit (119a). This suit was filed within three days, in behalf of this particular plaintiff, seeking multilateral arbitration because of the obvious jurisdictional dispute. (Columbia Broadcasting System v. American R. & B. Assn. 414 F2d 1326) and also asking for equitable relief and further relief including damages (119a - 120a).

The Employer's answer to the complaint asserted by way of affirmative defense three objections to arbitration: (a) The

claim that "the NLRB had primary jurisdiction of the case" and (b) "the complaint failed to state a claim on which relief could be granted" and (c) "plaintiff had failed to join indispensable parties" (123a). The last point responds to amendment of the initial complaint when a competing labor organization, to whose members the tape editing work was assigned disclaimed interest by agreeing "that it would not challenge plaintiff's claim* to the tape-editing work" (120a). That third defense clearly demonstrates that a multiparty dispute was still in progress.

While resisting arbitration by its answer and otherwise (129a - 130a) the employer brought about a work-assignment jurisdictional dispute hearing (NLRA Sec. 10k) by the Board which took jurisdiction of the matter well within 90 days after the grievance arose and held on to jurisdiction until November 28, 1975 (124a - 125a). The outcome of the NLRB hearing was a decision against the plaintiff with respect to a portion of the work assignment and plainly left open to prosecution in this action or otherwise the plaintiff's claim for the "judgmental" as opposed to the "mechanical" aspect of motion picture editing with regard to video tape (124a) (Explained at R.69a - 70a, quoted at p. 16, infra).

On January 12, 1976, as a result of a pre-trial conference before Judge Pollack (see Docket Sheet 1a), plaintiff

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*The disclaimer was deemed ineffective by NLRB, 89a.

was led to conclude that it need not move for summary judgment directing arbitration and that it was now free to file with the AAA for the arbitration which it had sought to have directed by this action and which had been resisted and blocked by the defendant and pendency of the NLRB proceeding.

It seemed appropriate, in the light of colloquy at the chambers conference, to let it be defendant's burden to move to add the missing party that its Third Affirmative Defense alleged was lacking, and the case law so indicated. Window Glass Cutters League v. American St. Gobain Corp. 428 F 2d 353, 354. If the controversy was still multilateral despite the NLRB decision, Judge Pollack seemed to intimate, plaintiff need not make the motion for summary judgment; let defendant make such motion as they please after the arbitration process gets going, now that NLRB is out of it. (See the contemporaneous documents in the record plainly reflecting the foregoing at 74a and 75a; references to a possible motion to stay would otherwise be meaningless.)

There followed a sly maneuver that began the sequence of events that made these appeals inevitable, once Judge Pollack - acting as we think we can show, out of excess of judicial self-restraint - refrained from vacating the Schmertz award.

Shortly after the January 12, 1976 chambers conference and letters, defendant's first attorneys, who by pleading and otherwise had resisted arbitration, were replaced but only

after the Schmertz designation was made) by the present attorneys for the defendant-appellant.

The new attorneys consented in only a limited way to arbitration, without moving for the stay or consolidation which had been promised at the pre-trial conference by their predecessors. There had been raised by a letter from their client, nine days after the chambers conference, the question of time-bar as an obstacle to arbitration (76a). No such claim had been made January 12 by their attorney. That time-bar claim was raised without any concession that the controversy had become bilateral; or that it was substantively determinable within the four corners of a single labor contract; on the contrary pursuing the position pressed on the court the previous March by its still unamended pleading, defendant insisted that no substantive decision could be made without a court-ordered addition of a supposedly indispensable party or parties, (63a).

With all due respect to Judge Pollack, the implications of this sequence of events were insufficiently considered by him; the biased arbitrator naturally swept them under the rug altogether. But the facts are plain and indisputable:

(a) The persistently multilateral dispute.

From the moment the entire controversy began (and to this day) the dispute has been multilateral, rather than bilateral.

This was precisely the kind of case for which this

Court created a new doctrine of federal "common law" of labor relations in Columbia Broadcasting System Inc. v. American Record and Broadcasting Ass'n. 414 F 2d 1326 (1969), a case followed and applied in every circuit in which comparable problems have arisen.*

No contract involved in the present case - and rarely in any case - provides for contemplates or authorizes tripartite arbitration. Yet it is uncontradicted that, absent an effective and meaningful disclaimer by the competing unions, ("meaningful" in the sense of acceptance by the employer,) no arbitrator, designated and bound by the four corners of a single bilateral contract, procedurally or substantively, could give complete and adequate relief in this type of dispute.

In its sole pleading in the court below, the defendant agreed with this analysis and alleged:

> "As and for a Third Affirmative Defense
>
> (13) Plaintiffs have failed to join parties needed for a just adjudication under FRCP 19 (a)" (47a)

As was said of this in the moving affidavit to vacate:

> Defendant never moved to add such party or parties as it alleged to be necessary, but never withdrew that Third Defense,
>
> The claim of insufficiency of parties was pressed

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*Noted in 64 ALR, 3d 528, 532-4.

> by defendant's attorney Gallagher at the January 12, 1976 pre-motion conference; it was renewed at the hearing before Mr. Schmertz by Mr. Batterman of the recently substituted Proskauer firm, who asserted . . . that still another labor organization, the Writers Guild, should be given the work which plaintiff was seeking to have assigned to it. Mr. Batterman said that if the arbitrator ruled against him on time-bar the employer would not further participate in the arbitration without first "going to court within 48 hours" to move (presumably to implement, belatedly, the Third Affirmative Defense) for a consolidated arbitration of the present grievance with a supposed grievance concerning the Writers Guild (AFTRA) contract. (62a - 63a).

This of course was not denied and these facts must be kept in mind throughout review of these appeals. The factual propriety and legal necessity for invocation of judicially directed arbitration (as contemplated by the doctrine of Columbia Broadcasting System Inc. 414 F. 2d 1326) makes it utterly absurd for appellant to state, as it does on brief in this Court, that "there is not one word in the contract suggesting or permitting a judicial remedy" (Br. 5; see also Br. 16) and it was improper and deliberately misleading for defendant-appellant to state that we "filed an unnecessary complaint seeking to compel arbitration" (Br. 8, emph. supp.).

The record shows the commencement of the action within three days of the eruption of the initial dispute and the refusal within six days, by the employer, to join in arbitration. This rejection by defendant of applicability of the bilateral agreement to arbitrate was manifested February 27, 1975 by the Employer's

initiating a work assignment dispute case at the National Labor Relations Board. Rejection of bilateral arbitration was subsequently repeated by its sole pleading in this action, served and filed within 30 days after the initial phase of the dispute between the parties began. This refusal to abide by the two-party contract dispute resolution procedure was repeated once again by the employer at the New York State Mediation Board.*

These repeated refusals to join in bilateral arbitration took place well within the initial 90 day period following the initial phase of the multiparty dispute, which was multiparty on several levels since it involved a number of separate craft assignments. (106a). The facts as to these are set forth more fully in the affidavit of support of the motion to vacate, and the exhibits. Not only had the employer manifested its view as to inapplicability of the contractual provisions for dispute resolution in its pleading in the action and by going to the NLRB: the assumption of jurisdiction by the NLRB effectively

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*The following is also uncontradicted and was known to Schmertz: "The employer also refused arbitration in March 1975, by the position it took at the New York State Mediation Board, which had assigned a mediator (because of the picketing) to attempt to adjust the dispute. Mr. Gallagher, as a witness for the defendant at the Schmertz arbitration, confirmed my statement that he had taken a firm position that the employer would refuse to participate in arbitration unless (a) all unions in all crafts claiming all aspects of the work were made parties and (b) the arbitrator (contrary to the contract) was required to apply NLRB jurisdictional disputes criteria in making his determination." (69a).

precluded plaintiff from prosecuting this action pending resolution of the proceedings there, as shown by statements made in the Court below during argument of a related case, March 6, 1975, discussed in subdivision "b" immediately hereafter:

(b) The practical bar to plaintiff's proceeding pending NLRB decision.

This is of some importance, and the reference to it in the record was not questioned by Judge Pollack on the motion to vacate. The precise nature of what occurred March 6, 1975 is worth setting forth:

> "A companion action, Moshlak v. RKO General Inc. WOR-TV, 75 Civ. 877, came on for initial hearing on a motion for a temporary injunction on or about March 6, 1975. (Moshlak was Local 52 of I.A.T.S.E., one of the labor organizations including the two initial plaintiffs in this action, Local 644 and Local 771, which were involved in the NLRB case and related matters.) Because Local 771 contemplated a motion for summary judgment in order to expedite arbitration, (defendant's Answer had not yet been filed March 6) I attended and participated in that temporary injunction hearing. The then attorney for the employer, Mr. Gallagher, resisted Moshlak's motion on the ground, inter alia, that the matter was "before the National Labor Relations Board" and that he expected the Board to assume jurisdiction and issue a Notice of 10(k) Jurisdictional Dispute Hearing shortly; with reference to this the Court (Judge Pollack) said, or indicated in substance, to counsel for all these plaintiffs, that he was not disposed to entertain applications for relief in these cases if the NLRB should assume jurisdiction, nor take further action until after the NLRB relinquished jurisdiction. (64a - 65a Emph. supp.)*

*How else can be understood, in a hard working court whose judges press for disposition after joinder of issue, the docket gap between March 1975 and January 1976?

(c) The legal bar to plaintiff's proceeding until NLRB resolution of the dispute and relinquishment of jurisdiction: Judge Brieant's injunction.

As the record shows, within six days after plaintiff filed its complaint seeking multilateral arbitration, the defendant initiated an 8(b)(4)(D) (jurisdictional dispute) proceeding at NLRB, naming five different labor organizations (104a - 106a). First fruits of that action were the issuance of a 10(k) Notice of Hearing by the Board on March 24, 1975 (65a) and an order of Judge Brieant (75 Civ. 1520) restraining plaintiff, among other things, from "threatening, coercing, or restraining WOR-TV, or any other person . . . where . . . an object thereof is to force or require WOR-TV, or any other persons" to make work assignments at variance with those initially instituted by defendant (April 10, 1975, 56a - 57a). The "opinion" of defendant's complaisant arbitrator may be searched in vain for any reference to this injunction, which did not lose its force until November 28, 1975, when the Employer-instigated complaint was withdrawn by the NLRB's regional director (65a).

When the injunction case, Danielson v. International Alliance (75 Civ. 1520) was first filed, we raised a question as to whether or not it should be referred to Judge Pollack for determination, in view of the latter's assignment, prior thereto, of the present case and of Moshlak v. RKO General Inc. 75 Civ. 877. Judge Brieant referred this threshhold question to Judge

Pollack for his views, and there ensued a lengthy chambers conference at which, among other things, Judge Pollack reiterated his view that had been expressed on March 6 (64a - 65a) that there would be no action entertained by him propelling either this, or Moshlak forward, until there had been an NLRB determination. Thereafter he sent the case back to Judge Brieant, who issued the injunction above referred to. The record shows what happened thereafter:

> "Having accepted and assumed jurisdiction of the overall dispute (over resistance by Locals 52, 644 and 771 which, as to Local 771, was based on its desire to have the matter decided by arbitration, (see the decision in 219 NLRB No. 185, slip op. pp. 9-14) the NLRB commenced hearings, received briefs and made a decision in the preliminary 10(k) phase of its procedures, 219 NLRB No. 185 [79a - 103a].
>
> "The following is a summary, for convenience, of the 10(k) disposition which preceded the 8(b)(4)(D) Complaint of October 30, 1976. With one exception the Board decided that the employer's choice of work assignment was to be given effect. This had totally adverse consequences with respect to Locals 52 and 644. However, there was only a partly adverse result with respect to Local 771, as appears from the portion of the NLRB decision quoted in my letter to the Court of January 12, 1976. [Text at 74a]. For present purposes, it is sufficient to say that the effect of the NLRB decision was de facto to amend the RKO-WOR agreement with Local 771 so that Local 771 could not claim the mechanical or non-judgmental aspect of editing tape for television news broadcast, but to leave open for an entirely new disposition between the parties what was to be done with respect to a work assignment of the 'judgmental function' (69a - 70a)."

(d) Events following NLRB Relinquishment of Jurisdiction

When the NLRB proceeding was dismissed on Nov. 28, 1975, there arose, for the first time, a dispute or grievance as to whether the employer would, in the aftermath of the NLRB decision, assign the non-mechanical editing function to plaintiff's members, 71a - 72a. When that new dispute could not be resolved by agreement, application was promptly initiated Dec. 8, 1975, for a chambers conference (pursuant to Judge Pollak's special rules) preliminary to a motion for summary judgment directing arbitration (73a). That was the conference, described supra pp.7-8, as a result of which a "demand" for arbitration was filed with the AAA - which would put it to the defendant to move, or not, to implement the objection stated in its affirmative defenses (73a - 75a).

As the record shows:

> ". . . the very description of the issue submitted to the AAA on January 12 was one that could not have been framed prior to the disposition of the NLRB proceedings: [51a]
>
> > "Employer's breach of obligations under Article XVIII of Collective Bargaining Agreement as well as all other pertinent clauses, with respect to matters left undecided by NLRB decision in Case 2 CD 489."
> >
> > (Emph. supp.)
>
> That submission to the AAA, especially the language underlined, would not have made sense, could not have been drafted prior to the interlocutory NLRB award. Mr. Schmertz did not truthfully

record in his opinion any aspect of these matters and disingenously omitted all reference to the NLRB decision. The sentence that opens the last paragraph of page 1 of the Schmertz 'opinion' [R. 35a] makes reference to a "decision by the Employer on or about February 21, 1975 not to assign certain 'judgmental or creative' work in connection with news editing," etc. This distorts and "covers up" the fact that the concept of separating out the judgmental or creative aspect of the work did not originate until the NLRB decision in August and a grievance with regard to it did not arise until after November 17, 1975. The quoted language describes the grievance that the AAA was asked to pass upon, and it was with regard to this new issue that Schmertz declined to act, although that is not at all clear because of this distortion in his opinion." (72a)

Cross-Appellant's Argument for Vacatur

The nature of the dispute that was precipitated by the defendant Employer's actions of February 1975, required resolution by a remedy not contemplated or provided for by the contract. Both parties to the contract perceived this to be obvious; they disagreed only as to what to do about it. Each acted on the assumption the dispute was multilateral; the plaintiff by invoking this Court's judicially-created remedy of multilateral arbitration (and seeking other relief) and the defendant by going to the statutorily created tribunal, the NLRB (10k) hearing.

Defendant's choice of forum brought it two tactical advantages: an injunction that plaintiff could only disregard at its peril, and an explicit (if unrecorded) determination by the District Court to "wait and see" what the NLRB would do. These advantages insulated defendant from action propelling forward

the plaintiff's correctly-initiated move for a consolidated arbitration. They sheltered defendant's refusal by pleading and otherwise to participate, at least prior to January 12, 1976, an arbitral resolution of the dispute. When the course of the NLRB proceeding had run, defendant was confronted with a litigable issue surviving NLRB adjudication and plaintiff was then free to pursue a judicial arbitral remedy for the solution of that remaining issue.

After the January 12 chambers conference, which it regarded as clearing the way, plaintiff promptly took the initiative to secure the appointment of an arbitrator. It filed a Demand with the AAA that put on the defendant the burden of establishing judicially its still pending claim of insufficiency of parties and of meeting on the merits the claim of breach of contract.

After concealing its intention to switch attorneys until the designation of an arbitrator, however, defendant executed an extremely sly maneuver. It declined to participate in a hearing on the merits. It now wanted only to litigate time-bar. It announced that if the merits were <u>later</u> reached, it would insist upon its claim that the dispute could only be resolved multilaterally and that it "would not further participate in the arbitration without first going to court within 48 hours to move . . . for a consolidated arbitration." (R. 63a)

Ignoring this announcement and its implications in the light of the history of the dispute - and indeed ignoring the nature and essence of the true dispute between the parties - the arbitrator treated the matter as if it were and always had been a simple bilateral contract grievance in connection with which plaintiff had inexplicably and inexcusably failed within 90 days after the first dispute arose, to file a routine paper with the Arbitration Association.

The resultant ruling is so bizarre, so unconscionable and so unrealistic in its disregard of the true meaning and sequence of events, that it would be a manifest miscarriage of justice to permit it to stand.

However narrow the bounds of judicial review of an arbitrator's award may be, and they are not so narrow as to permit crude injustice, Holodnak v. Avco-Lycoming Div. 514 F. 2d 285, (Turkus, the arbitrator there involved, is as active in the field as Schmertz) they are not so slender as to permit the naked exercise of the absolute power that corrupts absolutely. And to say, as Judge Pollack did at the outset of this portion of his opinion that "questions of procedural arbitrability . . . are to be decided by the arbitrator rather than the courts" (126a) does not aid analysis. For all that means is that they may be decided in the first instance by the arbitrator, not by the courts. It does not mean that a wretchedly biased, grossly unfair or manifestly improper procedural decision is less reviewable than an

irrational substantive decision. That is clear from Los Angeles Newspaper Guild Local 69 v. Hearst Corp. 504 F. 2d 636, cert. den. 421 U.S. 930, a Ninth Circuit decision in which Judge Moore of this Court sat by designation.

It is not helpful, on this unusual record, in making a decision as to the need and the justification for correcting what Schmertz did to employ empty phrases such as "fundamentally irrational" or "draw its essence from the contract" or "manifest disregard of the law." Such epithets are indeed applicable to what Schmertz did here. But to perceive their applicability it is essential to view the pre-Schmertz proceedings as a whole, and to give due regard to the factors we have stressed in the factual narrative, (a) the multilateral qualtity of the dispute and (b) the concurrent seizure of the jurisdiction by NLRB aided by Judge Brieant's injunction and Judge Pollack's control of the case, which permitted him to stay proceedings, in effect, pending NLRB determination.

Apart from the fact that he ignored these, a further fundamental defect of analysis in Judge Pollack's approach was his fragmenting the case for setting the award aside into five compartmentalized arguments, (127a - 128a) and in failing to view the record as a whole as one compelling the conclusion that only a knave or a fool would hold the dispute to have been time-barred in the face of the indisputable sequence of events which made it irrelevant whether a piece of paper had been mailed to the

Arbitration Association at a particular point in time.

We do not claim that Professor Schmertz is a fool. We cannot accept any hypothesis for his total and absolute disregard of the factors abulated at the outset of our factual narrative

(a) the multilateral quality of the dispute throughout

(b) the dogged and successful resistance of defendant to arbitration and Judge Pollack's expressed reluctance to interfere pending relinquishment of the case by NLRB;

(c) the force and effect of Judge Brieant's injunction

save that his bias and determination to decide in favor of the defendant's newly retained law firm caused him to exceed his powers, to imperfectly execute them and to fail to make a final and definite award upon the subject matter. [9 U.S.C. Sec. 10(d)].

The conclusory concept implicit in the question "did the award draw its essence from the contract between the parties"? is meaningless in an attempt to secure resolution by arbitration of a multilateral (and hence multi-contract) dispute as provided for in the Columbia Broadcasting System, Inc. (414 F. 2d 1326); at least insofar as contractual procedural requirements are concerned (cf. Local No. 552 v. Hydraulic Press 371 F. Supp. 818, 825, S.D. Mo. 1974). Otherwise the constructive and creative contribution of that rule and national labor policy would be thwarted.

We regret that Judge Pollack slipped, on this point,

and made the further error of saying "that Local 771 itself demanded bilateral arbitration in this case" (128a). The record plainly shows the existence of a multilateral dispute at all times - to and including the very date of the Schmertz so-called hearing, See R.62a (Third Affirmative Defense) 63a (Batterman insistence on need for presence of the Writers Guild), 64a, 67a, and entire Record, passim). That there was a brief interlude after service of the Amended Complaint when bilateral arbitration could have resulted if defendant had consented by appropriate responsive pleading, is a matter of theoretical and limited significance: defendant did not so respond - on the contrary, re-emphasized in its Third Defense (62a) the persistent multilateral character of the dispute and flatly declined to participate in the arbitration suggested by the New York State Mediation Board (well within the so-called 90 day limitary period) by refusing to consent to arbitration within the framework of the contract (69a).

It seems self-evident that where a prompt appeal has been made to a court to direct arbitration of a multilateral dispute and that court action is pending and neither dismissed nor withdrawn, (and in suspense only because of an NLRB proceeding) that it is "completely irrational" (cf. Swift Industries, Inc. v. Botany Industries, 466 F. 2d 1125, 1134) to refuse to hear the merits of a case on the pretext that grievant did not make a timely invocation of arbitration.

Schmertz, ignorant of or stubbornly refusing to recognize the implications of the multilateral quality of the case says: in effect, "I don't care about what was going on at the NLRB or its effect on what could be done in court; they should have mailed a paper to the AAA."

This Court can and should be concerned with such a ruling. Judge Pollack unfairly omitted his own repeated announcements from the Bench and in Chambers that he would not rule on the demand for arbitration until the NLRB had made its disposition.

Moreover, he incorrectly stated that cases in other settings permitting initiation of bilateral arbitration pending resolution of a 10(k) hearing justified rejection of plaintiff's attack on the Schmertz award (130a). The posture of the present case required, in all fairness, a different view of the matter.

Contumacy or Disrespect

As the injunction order of Judge Brieant of April 10 shows, not only was picketing or the inducement of refusal to work enjoined, but also, "threatening, coercing, or restraining WOR-TV or any other person" etc. (57a)

The Board and its enforcement arm, the General Counsel, have differed as to whether or not an attempt to compel arbitration in the present context pressed during the pendency of a 10(k) proceeding would be a violation of the law. General Counsel had issued complaints based on such construction and the Board recently disagreed in such cases as Sheet Metal Workers, 209 NLRB

1177, and Sheet Metal Workers Local 28, 222 NLRB No. 110. These cases involved only the question whether there should be a "cease and desist" order; in the situation between April 19, 1975, and November 28, 1975 (when the injunction expired on withdrawal of the charge) going to the AAA for the purpose of propelling the arbitration forward would have been done at peril of a contempt citation if General Counsel wished to press for one, to get a ruling on a state of facts different from the Sheet Metal Worker cases.

The hazardous situation of a party in this area is highlighted by such cases as Associated General Contractors of California, Inc. v. NLRB, 514 F. 2d, 433 (9 Cir. 1975), where the Court overruled the Board and agreed with NLRB General Counsel that "when Congress used 'coerce' in Section 8(b)(4)(B) it did not intend to proscribe only strikes or picketing, but intended to reach any form of economic pressure of a restraining nature." 514 F.2d at p. 538. As shown in the 40th Annual Report of the Board, p. 161, the pressure in that very case was that the union had "invoked the agreement's arbitral process" which resulted, p. 162, in an "arbitral award" of damages.

The Supreme Court has seemed to indicated that non-picketing activity can be coercive. See NLRB v. Fruit and Vegetable Packers Local 760, 377 U.S. 58, 68: "The prohibition of Section 8(b)(4) is keyed to the coercive nature of the conduct, whether it be picketing or otherwise."

In Boire v. International Brotherhood of Teamsters,

479 F.2d, 778, 802, the Fifth Circuit clearly indicated that an attempt to enforce a contractual provision could constitute an unfair labor practice, citing McCleod v. AFTRA, 234 F. Supp. 832, Aff'd per curiam in this Circuit, 351 F. 2d 310.

A recent authoritative exposition by this Circuit appears in Sperry Systems Management Division v. NLRB 492 F. 2d, 63 (cert. denied 419 U.S. 831). There, this Circuit overruled the Board and held "that the union's effort to enforce the arbitration award after May 1st constituted the unfair labor practice of refusing to bargain collectively." While the issue involved in the Sperry case was one of appropriate unit, the entire discussion of the Court, 492 F. 2d, pp. 66-69, clearly indicates that an attempt to bring about, by enforcement of contract grievance procedures, a result incompatible with a Board decision, is violative of the Act. It could not be said to be the "essence" of the agreement that one party should risk other law violation charges, merely to file a paper writing with the AAA, when the Defendant was thoroughly on notice that Plaintiff intended to seek arbitration and had asked for it judicially.

Apart from the question of possible contumacy created by the order of Judge Brieant issued in aid of NLRB jurisdiction, there was the problem created by Judge Pollack's control of the case and his own refusal to act with regard to the pleadings (i.e. Defendant's Third Defense) pending relinquishment of the case by the NLRB. (See pp. 14-16, supra.)

Futility

Assuming for the moment the theoretical possibility that the plaintiff had initiated AAA intervention aside from its court action to compel arbitration, what could have been the fruit, once the NLRB had taken jurisdiction? Would any useful purpose have been served if the plaintiff had ignored the injunction and the reality of what was going on at the NLRB and mailed the paper to the AAA, which hindsight told the employer it should protest as belated?

Leading cases furnish the answer: Local 7-210 Oil, Chemical and Atomic Workers v. Union Tank Car Co., 475 F.2d 194, cert. denied 414 U.S. 875, held that an arbitrator's award of damages under a contract was in effect vacated by a Board decision that the unit represented by the grieving plaintiff was not entitled to the work in question. That case was consistent with and cited with approval the leading case, Dock Loaders & Unload Loc. 854 v. W. L. Richeson & Sons, 280 F. Supp. 402, where the Court said, in holding not only that an NLRB job allocation takes "precedence" over a grievance award to the contrary, but that the Court must deny damages accuring prior to NLRB decision where the award was prior in time to the NLRB's disposition and disobyed:

> "[Plaintiff's] argument fails to take adequately into account the Congressional policy enunciated in Section 10(k) that makes the statutory jurisdictional dispute procedure take precedence over contractual arbitration. If the parties were free to race to the forum, one to the arbitrator and the other to the NLRB, there is the counter risk that the party who successfully reached arbitration first would imperil the effectiveness of

the statutory remedy by making an employer liable in damages even when his position had been correct under the standards considered appropriate by the NLRB pursuant to its statutory mandate. National policy indeed encourages arbitration, as Lincoln Mills clearly holds. National policy also requires the resolution of jurisdictional disputes under Section 10(k). Full reach cannot be given to both remedies. And it would be inconsistent to subject the party whose cause has prevailed in a final judgment under a statutory procedure to liability for damages occasioned while it was seeking its statutory remedy. Therefore, in the light of Carey, I must conclude that damages may not be recovered here." (at p. 405)

The other side of the coin is shown in the relatively recent Board case of Newspaper and Mail Deliverer's Union (New York Times Company) 216 NLRB 941. There despite an arbitration award of the disputed work to the Mailers Union, the Board awarded the work to the Deliverers and totally disregarded the arbitration award.

These cases rest squarely on the language of Carey v. Westinghouse Corp., 375 U.S. 261, at 272. There the Court, while permitting arbitration in the absence of Board action, noted, "should the Board agree with the arbiter . . . the Board's ruling would, of course, take precedence; and if the Employer's action had been in accord with that ruling it would not be liable for damages under Section 301." Arbitration is permissible, in other words, but "the superior authority of the Board may be invoked at any time." (id.)

These matters are precisely what Judge Pollack had in mind, both at the argument of the Moshlak motion (in March 1975) and at the time in April when he had a preliminary conference with respect to the application for a temporary injunction finally

heard by Judge Brieant. Judge Pollack made it quite clear to the parties that there was no point in going forward with judicial action to secure arbitration until the Board had relinquished jurisdiction. *

Effect of Employer Obstructionism

The foregoing makes unnecessary to add the point, which has always been made in cases where a party that resisted arbitration reverses its strategy and claims as a procedural bar the fruit of its own obstructionism.

The question has been considered by other courts, and they support the plaintiff's position. Not necessarily directly in point but suggestive of what fairness required, is Los Angeles Newspaper Guild Local 69 v. Hearst Corp., 504 F.2d 634 Cert. den. 421 U.S. 930.

The Court of Appeals there affirmed an order to vacate an award that rejected arbitration as time-barred where there had been persistent refusal of the employer to arbitrate prior to the Guild's letter to the AAA. The employer's refusal in that case had been manifested by conduct similar to that of RKO General save for an additional factor in our case: the present defendant's invocation of the jurisdiction of the National Labor

*And see Opinion 11/29/76, Lasker, D.J. in Moshlak v, ABC, Morio et al. (76 Civ. 260,2158) citing cases supra p.27 and holding "It would therefore be both duplicative and futile not to stay the court proceedings in 76 Civ. 260 pending resolution of the controversy before the Board."

Relations Board, which not only frustrated pro-tem the contract grievance procedure but also effectively prevented prosecution of this action while the Board had jurisdiction.

In the Hearst case, the very contract, as quoted in one of the lower court decisions, 352 F. Supp. 1382, at 1383, required, much like the ROK-WOR-771 contract, that "a grievance . . . must be resolved, dismissed or submitted to arbitration within sixty(60)days.

The dispute there arose in December 1967, and as appears from the Circuit Court opinion the employer reiterated its prior resistance and "added the ground that the matter was not arbitrable because the Guild had not made a timely request for the appointment of an arbitrator." (504 F.2d at p. 640). The arbitrator "ruled that the grievances filed by the Guild were not arbitrable because of the failure of the Guild to cause the appointment of an arbitrator in a timely manner as required by Article VII of the Collective Bargaining Agreements." (352 F. Supp. at 1384. That Article VII contained the 60-day language quoted above.)

The Court of Appeals affirmed the action of the District Court in vacating the award, precisely because "it was Hearst and not the Guild which refused to recognize any duty to arbitrate." It held that the employer had thereby precluded itself from invoking a claim of lack of timeliness (504 F.2d at

p. 642.)

The Hearst case, and the decisions cited below are in accord with teaching of the Supreme Court in Vaca v. Sipes, 386 U.S. 171 at p. 185:

> "An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of an employer amounts to a repudiation of those contractual procedures, Cf. Drake Bakeries v. Bakery Workers, 370 U.S. 254, 260-263m 8.L. ed. 2d 474, 478-481, 82 DS. Ct. 1346. See generally 6A Corbin Contracts § 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action."

The arbitrator manifestly ignored this well-established rule, which need not be argued further. Representative cases of competent courts and rational arbitrators are appended in a footnote.*

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*See, e.g., Southwestern Electric Power Co. v. Local Union No. 738, 293 F.2d, 929:

> "The record clearly shows an unwillingness on the part of the Company to recognize the Union's claims as a grievance which was covered by the arbitration clauses of the contract. Upon receipt of the letter, the Union had justification for the belief that the performance of the conditions precedent would be useless. The repudiation of arbitration as a means of determining the dispute was unequivocal. The Company is estopped to assert now that arbitration cannot be had because the specified conditions precedent had not been performed."

See, also, International Assn. of of Machinists, Local 2003, 296 F.2d, 238, and General Tire and Rubber Co. v.

Local 512 Etc., 191 F. Supp. 911, Aff'd. on opinion below, 294 F. 2d 957.

As the District Court said in its opinion in General Tire at 191 F. Supp. 914:

"Moreover, the plaintiff's attitude . . . made it obvious that pursuit of said procedure would have availed the union nothing. Faced with this attitude the Union was not required to do a vain and usless thing. (Citations)."

As to what impartial arbitrators do, see e.g. E.F. Hauserman Co. 42 LA at p. 1082:

"It is also a well-known rule of construction that contractual time limitations for filing grievances should be strictly construed to avoid forfeiture. (Globe-Wernicke Co. 33 LA 554; Conway-All Corp. 41 LA 169). These provisions are not designed to serve as a 'trap for the unwary', nor are they to be construed as a strict statute of limitations. But rather, their primary purpose is to prevent delay in processing. (Globe-Wernicke Co., supra at page 555.). . . .

"Furthermore, a claim of untimely filing should not be sustained if the conduct of the party asserting the claim has been such as would make it unjust to conclude that the grievance was not timely filed."

And see, generally, cases cited in Elkouri & Elkouri, How Arbitration Works, 3d Ed., 1973, B.N.A.) at p. 149 for following paragraph:

"It has been held that doubts as to the interpretation of contractual time limits or as to whether they have been met should be resolved against forfeiture of the right to process the grievance. Moreover, even if time limits are clear, late filing will not result in dismissal of the grievance if the circumstances are such that it would be unreasonable to compel strict compliance with the time limits specified by the agreement."

The Arbitrator's Total Disregard of the Modification of Plaintiff's - grievance by NLRB action.

Even if there were any sense to applying the 90-day period, realistic appraisal of what had happened at the NLRB placed plaintiff well within it.

The submission to arbitration herein made it very plain that the plaintiff in its capacity as grievant on January 12, 1976 at the AAA was presenting a new dispute solely "with respect to matters left undecided by NLRB decision* in case 2 CD 489." (51a) That dispute was what was referred to the AAA for decision on the merits, but it was neither reached for decision, nor its timeliness even considered.

The Arbitrator deliberately mis-stated that quoted language in the submission to the AAA. He describes the event involved in the dispute as a decision of February 21st "not to assign certain 'judgmental or creative' work in connection with news editing to members of the bargaining unit represented by the Union."

The concept of a grievance involving "judgmental or creative" editing as a separate, independent and new grievance

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*That NLRB decision had become final only on November 28, 1975.

did not exist in February 1975. It could not have come into being until after the much later consequent transformation by the NLRB of the relation between the parties. The Arbitrator's so-called Opinion is at best irresponsibly careless and at worst deliberately deceptive in ignoring this.

What the NLRB had done, at the employer's instance, was to put Article XVIII into its crucible together with the employer's claims as there presented, together with defendant's separate agreement with the International Union, IATSE, with respect to the RAT Unit. This was processed with the reams of testimony and exhibits about the change from film cameras to videotape cameras. The Board produced from all this a decision subtracting from our Article XVIII "the mechanical function of operating the technical equipment needed to edit the tape." (excerpt from portion of NLRB decision quoted in letter of plaintiff's attorney to the court January 12, 1976.) (74a)

The plaintiff's original February 1975 grievance was in effect aborted by the submission to the NLRB and made academic by its adjudication. A new grievance arose in the aftermath of the NLRB decision, when the plaintiff, on November 17, 1975 presented a new demand to the employer. In effect, the plaintiff said:

> "You have won a division of our work functions from the NLRB and the right to assign a portion of them to members of another labor organization. We ask you now, pursuant to our contract as left unaffected

by the NLRB decision(despite your litigating position there) to give this work to our members."

When the employer refused this demand - which it entertained for substantive consideration at first and did not resist as untimely (73a-74a) - a new grievance came into being, and the submission to arbitration of January 12, 1976 was well within 90 days of November 17, even accepting the arbitrator's own interpretation of the time-bar requirements of the agreement, (and assuming for present purposes that the Employer was not estopped even to invoke that clause.)

Conclusion of Plaintiff as Appellant

It is respectfully urged that the Court below could and should have vacated the Schmertz award, and referred the substantive dispute to another arbitrator, giving defendant leave, if it pressed the point raised in its Third Defense, to make a motion to the Court, based on that defense prior to the designation of the arbitrator so that if there is a bona fide competitor still in the wings, waiting to contest plaintiff's contractual work-assignment rights, an appropriate ruling can be made.

PART II

PLAINTIFF'S BRIEF AS APPELLEE

Counter-statement of Issues presented by Appellant

(1) Is an interlocutory order denying a motion to dismiss appealable when the question purportedly raised by such motion is effectively reviewable after final judgment.

(2) Did the Court below, assuming that order was appealable, have authority to entertain and consider the issue raised by a pleading seeking judicial relief for breach of contract where (a) the substantive issue had not previously been decided and (b) Defendant failed, during the time period available to it, to seek arbitral resolution of such substantive issues, either by seeking to stay the action or in any other fashion, and thereby waived such right as it might have to compel arbitration, and (c) defendant switched tactics and attorneys after expiration of the time period, solely for the purpose of using time as a bar to consideration of the merits, and pretended to submit to arbitration.

We have made a single "Statement of the Case" applying to both appeals. [supra p. 2]

The facts pertinent to appellee's response to the defendant's appeal must be deemed to include the narrative with respect to the litigation in this Court and at the NLRB preceding

the so-called arbitration. [suppra, pp. 6-18].

After the defendant sought and was denied 28 USC Sec. 1292 (b) relief with respect to its dissatisfaction with so much of Judge Pollack's order as denied its motion to dismiss, it filed its Notice of Appeal from the interloctory order and we promptly moved to dismiss. We incorporate herein, and respectfully refer the Court to our Motion and Affidavit of September 23, 1975 and the Brief submitted in support thereof, both of which have been referred to the panel of the Court that will hear these cross-appeals.

It is not necessary, in our respectful view, to impose on our relatively impecunious client, a rather small labor union of workers in a special craft, the cost of reprinting the contents of those documents here. In addition to such compelling rulings in this Circuit as Weight Watchers 455 F. 2d 770 and UAW v. National Caucus 525 F. 2d 323, we respectfully refer the Court to Liberty Mutual Insurance Co. v. Wetzel 96 S Ct. 1202, March 23, 1976, not cited in our brief on motion to dismiss.

The defendant's appeal should be dismissed on jurisdictional grounds, the order appealed from being a clearly non-final interlocutory order which can be reviewed at the end of the case below - unless, as we suggest above and reiterate here, it should be dismissed as moot in view of what we urge the Court to do with regard to the atrocious Schmertz award.

Argument with Respect to Defendant's Appeal

Properly understood, Judge Pollack's order is based on a judicious view that there is something inherently wrong and unconscionable in allowing a defendant to get off scot-free in the face of a repugnant arbitration award and conduct of plaintiff which he fairly found to have been "non-purposefully tardy." (139a) We think he was in error in not having gone further and that he should have expunged the odious Schmertz award. We have stated our reasons for this in detail above.

Everything said in favor of vacating the so-called award is of importance in evaluating Judge Pollack's absolute right to construe the pleading as invoking judicial as well as arbitral relief and his discretion in adjudging the defendant to be estopped from claiming a mandatory (so-called) arbitration clause, as a bar to litigation. Mandatory or optional, a party is competent to waive his rights under an arbitration clause.

And waiver there can be if the full circumstances made it unfair to deny plaintiff access to the court, upon which he had been led by the defendant to rely rather than to seek relief in arbitration. Reynolds Jamaica Mines v. La Societe Navale Caennaise, 239 F.2d 689,693.

While the Federal Courts do not necessarily hold in every case that a mere failure to move to stay an action

constitutes a waiver, the rule nevertheless is such that waiver can be invoked by the plaintiff here. It is "The presence or absence of prejudice which is determinative," Carcich v. Rederi A/B Nordie, 389 F.2d 692,696. The fullest analysis is in Burton-Dixie Corp. v. Timothy McCarthy Co., 436 F.2d 405:

> "There is no set rule, however, as to what constitutes waiver or abandonment of the arbitration agreement. The question depends upon the facts of each case and usually must be determined by the trier of the facts. (Citation) In this case the District Court properly charged the jury that any conduct of the parties inconsistent with the notion that they treated the arbitration provision in effect, or any conduct that might be reasonably construed as showing that they did not intend to avail themselves of the arbitration provision, may amount to a waiver." (At p. 408)

As to the optional character of the contract, and the implications of defendant's conduct, plaintiff rests its case on the third portion of the opinion below. (131a-139a)

In effect, there was no bona-fide arbitration. There was an illusory submission to arbitration which was vitiated by defendent's "reservation" of its multilateral claim: The "hearing" conducted by Schmertz was a sham, and a trap. It has no validity as a bar to substantive adjudication.

CONCLUSION

THE ORDER CONFIRMING THE "TIME-BAR" AWARD SHOULD BE REVERSED AND DEFENDANT'S APPEAL DISMISSED.

Respectfully submitted,

Howard N. Meyer,
Attorney For Plaintiff
Appellee-Cross Appellant

ADDENDUM

Concerning the Dual Role of Eric J. Schmertz as Public Sector Board Member Elected by a Member of the Defendant-Employer's Law Firm and as Arbitrator Designated Just Prior to the Entry of that Law Firm into this case.

(from the Official Directory of the City of New York)

OFFICE OF COLLECTIVE BARGAINING

250 Broadway, New York, N.Y. 10007 566-3632

There shall be an Office of Collective Bargaining, the head of which shall be the Director, who shall be the person holding the office of Chairman of the Board of Collective Bargaining. The Director may appoint, and at pleasure remove, employees.

The Board of Collective Bargaining shall consist of two city members, appointed by the Mayor, two labor members designated by the Municipal Labor Committee and three impartial members, one of whom shall be Chairman of the Board and Director of the Office. The impartial members shall be elected unanimously by the other members and serve three year terms.

The impartial members shall constitute the Board of Certification within the Office of Collective Bargaining and the Chairman of the Board of Collective Bargaining shall serve as the Chairman of the Board of Certification.

The Office of Collective Bargaining provides procedures, including certification of collective bargaining representatives, mediation, impasse panels, and arbitration, for the resolution of labor relations disputes and controversies between the City and its employees.

Salary of the Chairman $45,418; other two impartial members $150 per diem. The City and Labor members shall serve without compensation.

Vacancies in the membership shall be filled for the unexpired terms in the same manner as initial appointments.

Board of Collective Bargaining

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Impartial Representatives:	
Arvid Anderson, 250 Broadway, New York, N.Y. 10007, *Chairman*	Jan. 1, 1979
Walter L. Eisenberg, 939 E. 24th St., Brooklyn, N.Y. 11210	Jan. 1, 1978
Eric J. Schmertz, 4450 Palisades Ave., Riverdale, N.Y. 10471	Jan. 1, 1977

City Representatives:

Vincent D. McDonnell, 14 Stuyvesant Oval, New York, N.Y. 10009
Edward Silver, 340 W. 57th St. New York, N.Y. 10019

Labor Representatives:

Harry Van Arsdale, President, New York City Central Labor Council, AFL-CIO, 386 Park Ave. So., New York, N.Y. 10016
Edward F. Gray, Asst. Regional Director, Region 9, UAW, 18 Commerce Drive, Cranford, N.J. 07016

Deputy Chairman (General Counsel)—Malcolm D. Mac Donald
Deputy Chairman (Disputes Settlements)—Thomas M. Laura
Executive Secretary and Director of Representation—John P. McNamara

Director of Elections—Anthony A. Tivoli

Acting Director of Information—John Pertusi

(Letterhead on file in this appeal)

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Attorney(s) for

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